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Inchoate Criminality

Andrew Cornford*

Abstract: Law-makers in many jurisdictions have recently created a range of new inchoate crimes: offences that aim to prevent an ultimate harm by criminalising conduct prior to the actual causing of that harm. Many observers have been worried by this development. They worry that these offences criminalise conduct that does not deserve conviction and punishment; that they are disproportionate in their impact on citizens and their liberties; and that their preventive aims would be better pursued outside the criminal law. This chapter asks whether these worries are persuasive. It does so by examining a range of inchoate crimes, including offences of attempt, endangerment, preparation, possession, and assistance and encouragement. It concludes that, while law-makers should be appropriately cautious about creating any criminal offence, there is no case for blanket scepticism about inchoate crimes.

1. Inchoate Crimes: The Case for Scepticism

When we hear the word 'crime', we tend to imagine a narrow range of offences. Murder, assault, rape, robbery, vandalism, theft – for most of us, such offences of culpably causing harm to person and property constitute the core of the criminal law. However, the criminal law has always extended beyond this core, to encompass offences – often seriously punishable offences – that do not involve harm to others or their interests. Notable examples include *inchoate crimes*: offences that aim to prevent a given ultimate harm by criminalising conduct prior to the actual causing of that harm.

In recent times, and across jurisdictions, law-makers have radically expanded the scope of inchoate criminality. Inchoate crimes themselves are not a recent invention: the common law tradition, for example, has long criminalised attempting, inciting, and conspiring to commit other crimes. However, these traditional, general offences are limited in their scope. They typically require an intention that the relevant ultimate harm occur, and they catch only a limited range of conduct: for example,

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attempt often requires an act proximate to the actual commission of the intended offence. By contrast, the newer inchoate offences target a wide range of conduct, and sometimes do not require intention – or indeed, any form of culpability – as to the ultimate harm. Metaphorically, these offences are said to target conduct that is increasingly *remote* from the harm that they aim to prevent.

These newer inchoate crimes serve various purposes and have taken correspondingly various forms (Ashworth and Zedner 2014, pp. 96-102). Some are designed to deal with headline-grabbing threats, such as terrorists, sexual predators, and organised crime groups. Hence, law-makers have created offences of *preparing* to commit certain crimes, of *supporting* certain types of criminal activity, and of *membership* or *participation* in certain types of criminal group. Others are designed to deal with more mundane threats. For example, law-makers have created increasingly expansive offences of *endangerment*, and of *possession* of dangerous objects such as weapons or instruments of crime. More subtly, they have also re-defined some traditional offences in an ‘inchoate mode’: that is, in a way that does not require the occurrence of the relevant ultimate harm. For example, fraud may be re-defined to require only misrepresentation, and not the deception or resulting loss that the offence aims to prevent.

Many are worried by law-makers’ increasing readiness to create offences like these. The reasons behind this readiness are understandable: a key justifying aim of the criminal law is to prevent harm, and all else being equal, it is better to prevent harm by stopping crime before it occurs than by punishing it after it occurs. However, when law-makers focus exclusively on preventive efficacy, they ignore other factors that they ought to consider in making decisions to criminalise. They ignore the fact that criminalisation is not like other regulatory tools: it renders citizens liable to punishment, to the stigma of a criminal record, and to the coercive and intrusive enforcement actions of criminal justice officials. This fact, many argue, should lead law-makers to apply special constraints to the creation of inchoate crimes (Ashworth and Zedner 2014, ch. 5; Asp 2013; Husak 2007, ch. 3.III; Simester and von Hirsch 2011, chs. 4 and 5). Four worries in particular provide reasons for these proposed constraints.

The first and most serious worry that many people have about inchoate crimes is that they lead to unjust convictions and punishments. States are justified in convicting and punishing their citizens, this worry goes, only if those convictions and punishments are deserved; and convictions and punishments are deserved only if they are imposed for conduct that is both culpable and wrongful. To criminalise conduct that is not culpable or wrongful is therefore to facilitate unjust convictions and punishments. The worry is that many inchoate crimes do precisely this, because they criminalise conduct that is so remote from the harm that they aim to prevent (Simister and von Hirsch 2011, pp. 59-65, 71-73).

This first worry is easiest to understand if we adopt a *fact-relative* conception of wrongdoing. On such a conception, whether conduct is wrongful depends on the actual facts of the situation. This means that conduct is wrongful only if it actually causes harm to others (or violates their rights, dignity, autonomy, and so on). To help see the point, we can re-phrase it in the language of reasons. Wrongful conduct is conduct in which we have decisive reason not to engage. And our reasons against engaging in given types of conduct derive from the actual welfare of others (or their rights, dignity, autonomy, and so on). If conduct has no impact on these things, then there is in fact no reason to avoid it, and it is therefore not wrongful (Raz 1975, pp. 16-20; Gardner and Macklem 2002, pp. 442-450). Herein lies the problem with inchoate crimes: by definition, they criminalise conduct that has no such factual impact.

A second worry about inchoate crimes is their potential disproportionality. Even if an offence criminalises only conduct that deserves punishment, it might yet be illegitimate, because its effects are disproportionate: simply put, its costs might outweigh its benefits. The worry is that inchoate crimes are especially likely to be disproportionate when compared to the traditional core crimes, for two reasons. First, the reasons for their creation are relatively weak: the need to censure and punish the conduct that they target is not as strong as it is for crimes of culpably and directly harming others. Second, the reasons against their creation are relatively strong: they restrict citizens' liberties to a greater extent, and afford expansive enforcement powers that are easily abused. Again, law-makers must be sure to weigh these costs and benefits carefully, since an exclusive focus on preventive

efficacy will tend to obscure them (Ashworth and Zedner 2014, pp. 103-105; Feinberg 1984, pp. 190-193; compare generally Horder 2012).

A third, related worry is that the creation of these offences might prove unnecessary. Even if the benefits of criminalisation would outweigh its costs, it might still be unjustified, if an alternative to criminalisation is available that would be preferable, all things considered. Again, law-makers must consider the unique features of criminalisation as a type of regulation. Do they really need to subject inchoate conduct to conviction and punishment, or would a non-punitive response suffice? Since the reasons for creating these offences are mainly reasons of preventive efficacy, other interventions might prove more appropriate: for example, non-criminal regulation or preventive restrictions of liberty (Ashworth and Zedner 2012, pp. 562-570). Alternatively, even if criminalisation is appropriate, law-makers should avoid creating offences that are more extensive than necessary in their scope (Husak 2007, pp. 153-159, 168-176; compare again Horder 2012, pp. 85-92).

A fourth and final worry is that inchoate crimes are prone to fail even in their own preventive aims. By definition, these offences criminalise conduct that does not cause the ultimate harm that they aim to prevent; thus, the state need not prove in court any causal connection between the relevant conduct and the relevant harm. Instead, law-makers must satisfy themselves in advance that the former contributes causally to the latter – or at least, that we can prevent the latter by criminalising the former. However, law-makers are not social scientists: they are likely to get such judgements wrong, and in today's political climate, they are likely to err on the side of risk-aversion. In other words, they will tend to create inchoate crimes where doing so will not actually prevent the relevant ultimate harm. Since prevention is the purported justification for these offences, law-makers must again take special precautions to avoid such mistakes (Asp 2013, pp. 33-34; Baker 2007, pp. 376-381; Husak 2007, pp. 145-153).

On the face of it, then, we have a strong case for scepticism about inchoate crimes and their expanding scope. But is this case persuasive? I will suggest that it is not. While each of the above worries stems from a legitimate concern, they do not justify an attitude of blanket scepticism towards inchoate crimes. The first and most serious

worry – that inchoate crimes lead to unjust convictions and punishments – illustrates this point most clearly. The fact-relative type of wrongdoing described above cannot plausibly be required for legitimate criminalisation. And once we identify other types of wrongdoing that might suffice for this purpose, inchoate crimes no longer seem problematic, in and of themselves.

The three remaining worries are more persuasive, but again, fail to justify blanket scepticism about inchoate crimes. Law-makers should certainly consider the necessity and proportionality of all new offences, and the likelihood that they will achieve their preventive aims. But while some inchoate crimes undoubtedly fail on these criteria, others succeed. The reasons against creating such offences vary in their strength. And the reasons in favour include the strongest reasons for criminalisation available to law-makers: the prevention of serious, wrongful harm. In summarising the legitimacy of inchoate criminalisation, the best we can say is therefore: it's complicated. In what follows, I will explore some of this complexity, by examining a range of examples of inchoate crimes.

2. Unleashing Risk: Complete Attempts and Endangerments

Consider first a type of inchoate conduct that has long been criminalised in many jurisdictions: complete attempts. Complete attempters intend to cause harm, and have done everything that they need to do in order to do so; but for whatever reason, their plans fail. To take a textbook example: an assassin loads their gun, takes perfect aim, and shoots at their intended victim, only for a passing bird to get in the way and take the bullet. One *could* try to argue that it is illegitimate to criminalise complete attempters like this assassin. They have not done anything wrong, in the fact-relative sense: reasons against action derive from people's actual welfare (or rights or whatever), and no-one's welfare is damaged by the assassin's failed attempt. Yet the view that such conduct may not be criminalised seems dangerously false. And indeed, if legal systems criminalise any inchoate conduct at all, it is conduct like the assassin's.

The obvious explanation for this is that complete attempts are wrongful in a different sense: they unleash an *unjustifiable risk* of harm. When assassins shoot at their

targets, they impose risks on them: their conduct is likely to cause them serious harm, and they relinquish full control over whether that harm occurs. Moreover, their conduct is unjustifiable: they lack good reason for imposing such risks. Their conduct is thus wrongful, even though – ultimately and with any luck – the relevant harm might not occur.

The wrongness of unjustified risking is easy enough to understand. Perhaps true wrongness derives from actual harmfulness; but in the real world, the actual harmfulness of our actions is rarely certain in advance. We must therefore rely on judgements about risk: about the harms that our actions might cause, about the probability of their occurrence, and about whether these possible harms outweigh the possible benefits of our actions. Judgements about risk are not, strictly speaking, fact-relative. Rather, they are *belief-* and *evidence-relative*: they are judgements of how frequently we might expect a harm to occur, given what we believe about the situation or the evidence available to us. However, precisely because we often have only limited evidence about the results of our actions, such judgements can and should play a genuine role in guiding our conduct. Even if risks are not factual wrongs, they can thus be wrongs for which we may fairly be blamed – including, potentially, through criminal conviction and punishment.

By recognising the wrongness of unleashing risk, we can also explain the potential legitimacy of another group of inchoate crimes: endangerment offences. Whereas attempts involve risks of intended harm, endangerment involves risks of unintended harm. Most endangerment offences criminalise only specific types of risky conduct: stock examples are offences of careless or dangerous driving. But some jurisdictions also criminalise the unleashing of risks more generally, through offences of reckless endangerment. These offences are not ‘general’ in the same sense as the traditional inchoate crimes: they do not create an auxiliary form of liability that applies to all offences. Rather, they criminalise the risking of certain harms (such as death or injury) without requiring conduct of specific types (such as driving). Since such conduct can be wrongful, the state might be justified in convicting and punishing citizens for it, even when the harm risked does not occur.

It does not follow, of course, that law-makers *should* create general offences of reckless endangerment. Even if these offences target wrongful conduct, their creation might be disproportionate, because of their unwelcome side-effects. By definition, these offences catch a wide range of conduct: often, the only significant limitations on their scope are evaluative criteria, such as the unjustifiability or unreasonableness of the relevant risk. But the inevitable vagueness of such criteria grants significant interpretive power to prosecutors and courts. They are left to make what are effectively policy decisions about the reasonableness of risky conduct of different types – decisions that, arguably, they are not best-placed to make. A powerful example is the widespread use of reckless endangerment provisions to prosecute people for transmitting HIV and other sexually communicable diseases. Whether such conduct should be criminalised is a difficult and delicate issue; arguably, therefore, it should be settled by legislators rather than officials (Tadros 2001; Clarkson 2005, pp. 137-143).

By contrast, law-makers have relatively strong reasons to criminalise some specific types of risky conduct. Doing so ensures that we can prevent and punish the unleashing of serious risks, while avoiding unwelcome effects like those just described. This is true especially in regulated contexts – such as driving, environmental protection, and health and safety at work – where the applicable standards of care can easily be clarified and publicised. Of course, there are also problems with relying solely on specific endangerment offences. The resulting law is complex and piecemeal: it fails to catch some risky conduct that we might want to prevent and punish. But the desirability of prevention and punishment do not, by themselves, legitimise criminalisation. Given the drawbacks of general endangerment offences, they are less readily justifiable than their specific counterparts (Clarkson 2005; Duff 2005, pp. 57-59).

3. Preparatory Offences

To recognise the wrongness of unleashing risk, however, is not a big concession for the inchoate crime sceptic. The most worrisome inchoate crimes target risks of harm that have not yet been unleashed: that is, where the ultimate harm will occur only if further action is taken in the future, whether by the actor him- or herself or by a third

party. These offences are referred to variously as *preventive*, *pre-emptive*, *prophylactic*, or *pre-inchoate* offences. Their most discussed sub-category is *preparatory* offences: offences that criminalise conduct performed with the intention of causing harm, but at a relatively early stage in the actor's plan, before the risk of that harm is finally unleashed.

The view that preparatory conduct is not wrongful, and therefore may not be criminalised, has radical implications. It de-legitimises not only many of the newer inchoate crimes, but also the traditional, general inchoate offences. Consider liability for attempting crime. Although jurisdictions vary in the extent to which they do this, many criminalise some preparatory conduct through the general offence of attempt. Put differently, many jurisdictions recognise that there can be *incomplete attempts*: attempts where actors have not yet done all that they need to do in order to cause their intended harm. For example, imagine again an assassin who has loaded their gun, aimed at their victim, and placed their finger on the trigger. This time, however, the police intervene before any shots are fired – before any risk of harm is unleashed. To punish this assassin – indeed, to punish them *as an attempted murderer* – will strike many as unproblematic. Could the criminalisation of their conduct really be illegitimate?

Some bite the bullet and answer 'yes'. To decriminalise such conduct might seem radical, but that is the price we must pay for avoiding unjust punishments.

Preparatory actors, even incomplete attempters like our assassin, have not yet done anything wrong: they have not yet caused or unleashed any risk of harm. Such actors, the argument will go, have merely formed an intention to do harm. But forming a harmful intention is not, by itself, a culpable and wrongful act. Intentions are always revocable: as autonomous agents, we can always abandon them, and we retain full control over whether they will lead to harmful action. Of course, we may think badly of those who form harmful intentions. We may even take coercive preventive action against them, if this proves necessary. But when it comes to criminal conviction and punishment, preparatory conduct simply is not wrongful – and so states must give us 'room to repent' (Alexander and Ferzan 2009, ch. 6; 2012a; 2012b; for different arguments for similar results, see e.g. Asp 2013, pp. 35-45; Ramsay 2010, pp. 214-220; Wallerstein 2007a; 2007b).

But while preparatory conduct admittedly neither causes nor risks the relevant ultimate harm, it can arguably be wrongful in other ways. First, although preparatory conduct does not *unleash* a risk of harm, it can increase the probability that such a risk will be unleashed in the future. As criminal plotters progress with their plans, they take more of the steps that are necessary to ensure their success. They also progressively re-affirm and concretise their harmful intentions; they repeatedly confront the opportunity for abandonment and fail to take it (Ohana 2007, pp. 117-126). This line of thought provides a stronger justification for criminalising the later stages of preparation than the earlier stages: it more readily justifies criminalising assassins with their finger on the trigger than would-be assassins researching the heights of local rooftops. Nevertheless, it is an attractive explanation of why preparatory conduct might be wrongful, since it remains grounded in the relationship between that conduct and the occurrence of the ultimate harm.

Still, this explanation cannot *fully* rationalise the criminalisation and punishment of preparatory conduct. Much preparatory conduct, even late-stage preparatory conduct, does not increase the risk that the actor will succeed: this may remain unlikely, due to external circumstances, the actor's own incompetence, or just plain bad luck. Moreover, the thought fails to capture *why* many are comfortable with the criminalisation of some preparatory acts. Compare again the law of attempts. Attempts are not criminalised (only) because they risk completion: some criminal attempts, such as impossible attempts, carry no such risk. Rather, we criminalise attempts because they involve *trying* to commit a crime (Yaffe 2010, pp. 27-31). Analogous things seem true of preparatory conduct: acting on an intention to cause harm can itself deserve punishment, regardless of the probability of eventual success.

This leads us to a second explanation of the wrongness of preparatory conduct: acting on an intention to do wrong is itself wrongful (Tadros 2016, ch. 16). At the outset, we must acknowledge that this explanation is controversial. It requires us to accept that our mental states – the intentions with which we act – can render our otherwise-permissible conduct impermissible. This phenomenon has proved difficult to explain without simply appealing to our shared intuitions. Equally, however, we

must acknowledge that these intuitions are strong. Those who have made substantial progress with a criminal plan, but then abandoned it, seem materially different from those who have never made such a plan: we may blame the former for what they have done, at least to an extent. Indeed, the intended victims of such plans could plausibly even feel wronged, were they to learn of them. Such reactions suggest that preparatory conduct might be wrongful in itself, and therefore potentially a legitimate target for criminalisation and punishment (Duff 2012, pp. 134-142; Levenbrook 1980, pp. 58-59).

However, the view that preparatory conduct is wrong in itself might also be thought to have radical implications. It suggests that very early-stage preparatory conduct – conduct that seems outwardly to be entirely innocent – can potentially be legitimately criminalised. To see the problem, consider an example of a very broad preparatory offence: the offence of preparing acts of terrorism, under section 5 of the UK's Terrorism Act 2006. This offence criminalises anyone who intends to either commit or assist an act of terrorism, and who 'engages in any conduct in preparation for giving effect to [this] intention'. Suppose that a would-be terrorist forms an intention to bomb a city's metro system. Acting on this intention, they download a metro map, to see which stations might be suitable targets. Downloading a metro map, one might argue, is entirely innocent conduct. Yet in this case, under UK law, it is a crime punishable by imprisonment for life. Many will find this objectionable, suggesting that action on wrongful intentions does not, in fact, warrant punishment in and of itself.

To infer from this intuition that early-stage preparatory conduct cannot be wrongful is, however, too quick. The wrongness of a given type of conduct might be necessary for its legitimate criminalisation, but it is not sufficient: even if it is wrong for prospective terrorists to buy metro maps, it does not follow that this should be criminal. And indeed, law-makers have good reasons to be cautious about criminalising early-stage preparation. These reasons derive especially from how such conduct must be proved. Early preparatory acts are often distinguished from truly innocent conduct only by the intention with which they are performed. But by definition, this intention cannot be inferred from the acts themselves: it must instead be inferred from circumstantial evidence. Likely sources of such evidence include actors' opinions, demeanour, and associations with other known criminals. It is easy

to see how, in relying exclusively on such sources, courts and prosecutors might err in their findings of harmful intent.

Besides this obvious risk of unjust convictions, the criminalisation of early-stage preparation also risks intrusive enforcement. Officials will easily form *suspensions* of terrorist intent. But to confirm those suspicions, they will need to investigate suspects' opinions and associations – most probably through covert surveillance, or seizure of their phones or computers. Broad preparatory offences are thus likely to damage citizens' liberty and privacy. Meanwhile, the wrongness of 'buying metro maps with intent' may be relatively modest; a censuring and punitive response to such conduct may not be urgently needed. In short, the costs of criminalising such early-stage preparation may greatly outweigh the benefits – even if, in theory, conviction and punishment for such conduct would be just.

This need not be true, by contrast, for offences that criminalise only late-stage preparation. Consider another type of preparatory conduct that is now criminalised in many jurisdictions: the 'grooming' of children for sexual purposes. Compared to the terrorist preparation offence described above, grooming offences often criminalise only a limited range of conduct. For example, they might criminalise only adults who have contacted a child over the internet on multiple occasions, and who have actually travelled to meet that child. Those who have reached this stage in their plans are highly likely both to intend to abuse the child and to succeed in doing so. Although some ostensible groomers are indeed fantasists, they quit their plans at earlier stages. By limiting grooming offences in these ways, law-makers thus minimise their impact on those who are not prospective abusers, and focus on the conduct that there is strongest reason to punish (Sorell 2017; Ohana 2006, pp. 30-31). Grooming offences are thus more likely to be proportionate than offences encompassing early-stage preparation.

Some might insist, however, that this is not a satisfactory reply to concerns about the criminalisation of outwardly innocent conduct. Such criminalisation, they might argue, is objectionable *in principle*. While the above reply gives valid reasons against such criminalisation, these reasons could be outweighed, if the ultimate harm were serious and extensive enough – as it might be, arguably, in the context of

terrorism. But, the argument might continue, this cannot be right. We can and should distinguish between wrongful and innocent types of preparatory conduct. The former might include (say) building a bomb and putting it on a train. The latter might include buying matches or downloading maps. The mere fact that the latter conduct is intended to facilitate the former is not enough to render it wrongful – or at least, wrongful in a sense that should interest the criminal law (Simester 2012; compare Brudner 2009, pp. 108-130).

This purported distinction between wrongful and innocent preparatory conduct cannot, however, be drawn satisfactorily. The idea that some conduct is inherently innocent is perhaps plausible. But it is plausible because of our pre-existing ideas about why we would engage in conduct of different types. There are many imaginable innocent reasons for downloading maps; there are no such reasons for building and setting a bomb. The puzzle is how such generalisations about types of conduct could influence the permissibility of token preparatory acts. If I download a map for terrorist purposes, my reasons are not innocent. How could the fact that *other people* regularly download maps for innocent purposes grant *me* the permission to do so for terrorist purposes? True, this fact might make my terrorist purpose more difficult to prove – which, as noted above, generates reasons against criminalising such conduct. But how it could have normative force – how it could render my conduct non-wrongful – is difficult to see (compare Tadros 2016, pp. 314-315).

Conviction and punishment for preparatory conduct, then, do not seem inherently unjust. But even so, there remains a further objection to the criminalisation of such conduct: that there are alternative ways of dealing with it that law-makers should prefer. In particular, they could authorise *preventive restrictions of liberty* for those who are preparing criminal attacks. Law-makers should prefer this option, it might be argued, because it is a more parsimonious means of achieving their aims. The main reasons for creating preparatory offences arise from their potential to prevent harm – and not from the need to censure or punish the conduct that they target. We should thus prefer a legal regime that prevents harm without censuring or punishing. Moreover, such a regime allows the state to tailor its response to the threat posed by specific preparatory actors. It could therefore mitigate the costs of criminalising

preparatory conduct in general terms, such as the expansion of enforcement powers and the restriction of innocent citizens' liberties. Law-makers should thus prefer such a regime, even if conviction and punishment for preparatory conduct can in theory be just (Ferzan 2011; Alexander and Ferzan 2012a; compare Ohana 2006).

This objection highlights an important point, but once again, it is not decisive against all preparatory offences. If law-makers are considering such offences solely for reasons of preventive efficacy, then they should certainly also consider other, less costly means of achieving this aim. But as we have seen, the reasons behind preparatory offences need not be solely preventive. Some late-stage preparatory conduct – which evidences a firm intention to cause harm and makes the occurrence of that harm significantly more likely – may indeed warrant a censuring and punitive response. (Although exactly how serious a response may be difficult to determine: compare Alexander and Ferzan 2012b, pp. 111-117; Duff 2012, pp. 133-134.) Nor are preventive restrictions of liberty necessarily a less costly option than criminalisation. Existing regimes of such restrictions are in some ways more costly: they ground liability in predicted dangerousness rather than proven past conduct, and they avoid the procedural protections afforded to defendants in the criminal justice system (see generally Ashworth and Zedner 2014; compare Ferzan 2011, pp. 177-186, arguing that these costs can be avoided). Whether such restrictions are preferable to criminalisation must therefore be judged on a case-by-case basis.

In short, while law-makers should indeed be cautious about creating preparatory offences, there is probably no decisive objection to their doing so. Unless we take the radical view that all wrongs involve harming or risking – in which case, even the criminalisation of attempts is illegitimate – we should accept that preparatory conduct can potentially be legitimately criminalised. Admittedly, the view that preparatory conduct is wrong in itself is also problematic. But at least for late-stage preparatory conduct, for which there is no innocent explanation, this view will surely attract support. All things considered, criminalisation seems a potentially appropriate response to conduct of this kind.

4. Indirect Endangerment

A second type of preventive or pre-emptive offence is offences of *indirect endangerment*. These offences are similar to preparatory offences, in that the occurrence of the relevant ultimate harm depends on someone's future conduct. But whereas preparatory offences concern the actor's own future conduct, offences of indirect endangerment concern the conduct of third parties. They are, put simply, offences of *assisting* or *encouraging* the potential harmful conduct of others. Herein lies the fundamental worry about these offences: by definition, the relevant ultimate harm seems to be the responsibility of the third party, rather than the person criminalised. Can it be just to convict and punish citizens for taking a risk that *other people* will cause harm?

Andrew Simester and Andreas von Hirsch (2011) answer that this is not always just. The problem, they say, is *fair imputation*: what makes it fair to impute to one person the autonomous choices of another person? In truth, however, the language of imputation does not accurately capture their concern with offences of indirect endangerment. For their worry is not that these offences criminalise those who lack causal responsibility: surely we can contribute causally to ultimate harms *by* contributing to others' harmful actions (Simester and von Hirsch 2011, pp. 59-63). Rather, their worry is that these offences criminalise those who have not acted wrongly. Ordinarily, they think, our actions do not become wrongful merely because they might lead to other people acting wrongly. In justifying offences of indirect endangerment, the key question for law-makers is thus the *normative* relevance of the prospect that third parties might cause the relevant ultimate harm. Why does this prospect render the criminalised conduct wrongful (Simester and von Hirsch 2011, pp. 71-73)?

The answer to this question, Simester and von Hirsch argue, depends on the actor's *normative involvement* in the third party's conduct. It is not enough to show a causal link between the actor's conduct and the ultimate harm, even an entirely foreseeable one; the actor must also be responsible for that harm, in the sense that it is his or her 'lookout' (Simester and von Hirsch 2011, pp. 63-65). Sometimes, such responsibility will be easy to find: actors may occupy a role that makes them

responsible for the third party's conduct. But absent such special responsibility, actors must make *themselves* responsible, by 'affirming or underwriting' the conduct. Those who intentionally assist or encourage another's harmful conduct are easily seen as affirming or underwriting it. But the same is not true for those who assist or encourage harm unintentionally – who do things that risk helping or inspiring others to cause harm, but without meaning to do so. To justify the criminalisation of such conduct, say Simester and von Hirsch, something more is required (2011, pp. 79-85; for an alternative view, compare Duff 2005, pp. 62-64).

To illustrate the implications of this view, consider conduct that risks encouraging others to cause harm. Law-makers may be justified in criminalising such conduct, Simester and von Hirsch would argue, if the encouragement is intentional: here, there is sufficient normative involvement in the ultimate harm to render the encouragement wrongful. General inchoate offences of inciting or soliciting crime, which typically require such an intention, are thus potentially legitimate. By contrast, if the encouragement is unintentional, then the required normative involvement is probably missing. Consider, for example, the offences of encouraging and glorifying terrorism that have been created in some jurisdictions. These offences extend beyond direct incitement to criminalise abstract statements of support for certain ideologies, or portrayals of terrorist acts in a way that risks inspiration or imitation (Hunt 2007; Petzsche 2017). Again, the point is not that we lack a proven, foreseeable causal link between such conduct and the ultimate harm of terrorist attacks. The point is that it is illegitimate to criminalise such conduct *even if* there is such a link: without further normative involvement in the ultimate harm, such conduct is not wrongful and thus may not be punished (Simester and von Hirsch 2011, pp. 82-83).

Many have been influenced by Simester and von Hirsch's approach to offences of contributing to another's crimes (see e.g. Ashworth and Zedner 2014, pp. 111-113; Baker 2007; Dempsey 2005; Levanon 2012; Wallerstein 2007a). Yet despite its influence, it fails to provide compelling reasons for scepticism about such offences. The argument is meant to show that conviction and punishment for these offences is often unjust: that the conduct that they target is often non-wrongful. It therefore rests on a key implicit premise: that the intervening actions of third parties normally cancel

our reasons to avoid causing harm to others. Only if we are normatively involved in those actions, the argument must go, are these reasons reinstated. But it is unclear why these reasons would be eliminated, simply because the causal route to (potential) harm goes through a third party. As we saw earlier, it is wrong to unleash an unjustifiable risk of harm to others; so why would this become non-wrongful, simply because the risk takes the form of another person's actions? Simester and von Hirsch do not provide an answer, and as long as we accept that we can contribute causally to one another's actions, it is hard to see where one might be found (Cornford 2013, pp. 492-494; Alexander and Ferzan 2018, pp. 19-24).

It doesn't automatically follow, of course, that offences of indirect endangerment are legitimate. While we generally have reasons to avoid assisting or encouraging others' harmful conduct, we also have reasons to be cautious about criminalising such assistance or encouragement. One reason is that conduct can be socially valuable, all things considered, despite assisting or encouraging harm as a side-effect. If the risks of such harm are sufficiently small, and the social value sufficiently large, then such conduct might not be wrongful: although it involves a risk of harm from third parties, that risk might be justifiable. For example, discussions or portrayals of terrorist violence might contribute slightly to radicalisation, but also contribute greatly to artistic work, academic research, or important debates of social and political morality. The latter benefits might justify the former risk – in which case, it would be unjust to convict and punish citizens in respect of such discussions or portrayals.

A further justification for conduct that might assist or encourage others to cause harm derives from our liberty interests. If we are forced to refrain from such conduct because it might contribute to others' wrongful actions, then in effect, our liberties are restricted by others' propensities to act wrongfully. Again, such interference with our options is no licence to ignore the fact that our conduct might assist or encourage harm. But it might contribute modestly to the justification of those risks: plausibly, we have an interest not only in our liberties themselves, but also in their immunity from wrongful restriction by others. This interest might help to justify conduct that assists or encourages harm, and thus tell against its punishment, when the risks are sufficiently small (Alexander and Ferzan 2018, pp. 24-26).

Another reason for caution about offences of indirect endangerment is their tendency to produce chilling effects. These effects result from the enforcement powers that these offences afford and how these powers can be used in practice. For example, suppose that law-makers try to address the concern just mentioned: they insist that unintended risks of encouragement are criminal only if they are unjustified. Even so, we should remain sceptical about an offence defined in this way. As we saw earlier, an unjustifiability criterion provides little concrete guidance to officials. They are thus likely to interpret it in an unduly risk-averse way: they are likely to prosecute and convict some people whose conduct was actually or at least arguably justified. This is worrying not only because of the unjust punishments to which it will lead, but also because of the conduct that it will deter. If citizens wish to avoid involvement with the criminal justice system, then they will have to avoid certain valuable forms of expression – sometimes even justified forms. Worse, this effect will be especially strong among particular cultural and ideological groups – often already marginalised – on whom officials are known to focus. These effects might render these offences disproportionate, even when they target conduct whose punishment would be just (Cornford 2013, pp. 499-502).

A final reason for caution is that these offences are prone to fail in their preventive aims – especially where they do not require proof that the conduct criminalised makes the ultimate harm more likely. This is true of some of the terrorist encouragement offences mentioned above: although these offences require ‘encouraging’ conduct, they may not require that anyone actually *be encouraged* to commit terrorist acts. Theorists have long doubted whether the causal links between media communications and behaviour are strong enough to ground criminalisation (see e.g. Feinberg 1984, pp. 238-240). And more recently, these doubts have been strengthened through empirical research. One recent review of meta-studies suggests that this relationship is highly conditional: it depends on several variables, most of which are unrelated to the form or content of the communication (Valkenburg et al 2016). Whether conduct is truly ‘encouraging’ is thus a difficult question, and officials and courts may tend to be unduly risk-averse in their answers. Before law-makers criminalise such conduct, they should be satisfied that, in its context, it is truly likely to encourage the ultimate harm.

Once again, then, there is no decisive objection to offences of indirect endangerment, although there are certainly reasons for caution. The creation of these offences can have socially damaging implications. And we can easily conclude too quickly that a given type of conduct will actually assist or encourage others to cause harm. However, conduct can be wrongful, and can justly be punished, simply because it might have this result. If law-makers can address the above concerns, offences of indirect endangerment are potentially legitimate.

5. Possession Offences

Despite all the above, however, there remain some inchoate crimes that target conduct that seems neither culpable nor wrongful. Consider, for example, offences of 'mere' or 'simple' possession: offences that criminalise the possession of dangerous articles such as weapons, without requiring an intention to use the article to cause harm. Based on what we've seen so far, possession of dangerous articles might sometimes be wrongful. For example, it might be part of one's own plot to cause an ultimate harm, or it might unleash an unjustifiable risk that others will use the article harmfully. But possession offences also criminalise conduct that involves no such plot or risk. Some argue, therefore, that they can be criticised as *over-inclusive*: they target a narrow range of wrongful conduct, but do so by criminalising a wider range of more easily proven conduct, much of which is entirely innocent (Ashworth 2011; Dubber 2005; Husak 2004; compare Baker 2009). They therefore risk the unjust conviction and punishment of those who have done nothing wrong.

To illustrate this criticism, consider an article whose criminalisation is especially controversial: guns. Imagine that you enjoy shooting as a sport, and that you own a handgun for this purpose. You have no criminal intentions in which your handgun might play a part. Moreover, since you are entirely stable and responsible, you are unlikely to develop any such intention in the future. Of course, it is theoretically possible that a third party might steal your gun and use it to cause harm. But you are alert to this possibility: you keep your gun in a locked case, which you store in a safe; and when the gun is out of its case, you never let it out of your hands. Are you doing anything wrong simply by possessing a gun? Not obviously. Yet in some

jurisdictions, you are committing a serious criminal offence, punishable by several years' imprisonment. This, the critics argue, is unjust: in the absence of any culpability for the relevant ultimate harm, you simply do not deserve punishment for your actions (Husak 2004; 2007, pp. 170-173).

How might proponents of handgun criminalisation respond to this criticism? First, they might argue that possessing handguns is indeed wrongful, but in a way that we have not considered so far. Some conduct, they might point out, is not wrong in itself, but becomes wrongful as a result of its legal regulation. In the familiar jargon: there exist not only *mala in se* offences but also *mala prohibita*. Sometimes, law-makers have good reason to use the criminal law as a regulatory tool: to create rules that prohibit certain conduct, on pain of punishment, even though that conduct is not otherwise wrongful. And sometimes, breach of such rules becomes wrongful, in part because they are created and enforced by a competent authority. For example, before the state enacts and enforces a tax code, we have no duty to pay specific taxes; but once it does, we do. Tax evasion, in other words, becomes a genuine *malum prohibitum*. Once we acknowledge this possibility, the above criticism of possession offences is no longer necessarily decisive.

To see why some possession offences might plausibly be seen as genuine *mala prohibita*, return to the example of gun possession. Why might law-makers want to criminalise gun possession, when as we have seen, only some instances of such conduct are *mala in se*? The obvious answer is that they might want to disincentivise gun ownership. Since guns can cause such serious harm, yet are so easy to use, law-makers have strong reason to restrict their availability – not only to prevent wrongful types of possession, but also to reduce the risks of (for example) accident, suicide, and future wrongful use. Of course, whether legislation can actually achieve these aims is a contested question. But there is some evidence that it can: in the most comprehensive meta-study to date, relatively strong evidence was found for the effectiveness of restrictions on owning and carrying guns (albeit subject to serious caveats about methodological challenges: see Santaella-Tenorio et al 2016). If this evidence is sound, then law-makers might have good reason to regulate the mere possession of guns, since this will prevent more harm than regulating wrongful possession alone.

To justify criminalising gun possession, however, not only do law-makers need good reasons for regulating this conduct; it must also be wrong for citizens to breach the resulting regulation. In this context, breach might be wrongful because of our duties to promote one another's security: if we can take collective action to make each other safer, at a sufficiently low cost to our collective liberty, then we ought to do so. By criminalising gun possession, law-makers determine one form that such collective action will take. Moreover, this determination becomes binding, since our security will be enhanced only if enough of us obey the regulation. This argument is, of course, controversial: it depends on a particular view of the state's power to obligate its citizens, and any such view will be contested. But for our purposes, it is enough that this view is not obviously unreasonable, and seems acceptable from a range of political viewpoints. Inchoate crime sceptics should thus take seriously the possibility that possession offences – and indeed, offences of other kinds – might be justified as *mala prohibita* (Cornford 2015; for related arguments, see Horder 2012, pp. 96-100; Ripstein 1999, pp. 255-260; Tadros 2008, pp. 943-947; 2012, pp. 165-172).

Admittedly, however, even viewing gun possession as a *malum prohibitum* offence might not completely answer the concern about over-inclusion. Any purported such offence will be vulnerable to counter-examples of *harmless disobedience*: cases where a person commits the offence, but without apparently eroding other citizens' security. Imagine again that you are a conscientious gun-owner who enjoys shooting for leisure. If the safety measures that you take are sufficiently stringent, then not only will you avoid committing any *malum in se*; you might avoid imposing any risks to others' security *at all*. In that case, would you have done anything that deserves conviction and punishment – even wrongfully breaching a regulation? Again, the answer will depend on one's view of political obligation, but it seems unlikely (Tadros 2016, pp. 329-332). Even if the above argument is sound, the criminalisation of gun possession might thus remain unjustifiably over-inclusive.

This leads us to a second potential argument for the legitimacy of possession offences, notwithstanding their over-inclusiveness: sometimes, conduct may legitimately be criminalised even though it is not wrongful. So far, we've assumed

that non-wrongful conduct may *never* be criminalised, because when states punish their citizens for such conduct, they act unjustly. But arguably, the premise here does not entail the conclusion. Even if criminalisation would lead to some unjust convictions and punishments, it might still be justified, if there are sufficiently strong reasons for criminalisation that outweigh this potential injustice. Although many will see this rejection of a ‘wrongness constraint’ on criminalisation as the nuclear option, a reasonable case can again be made for it (Cornford 2017; Edwards 2017; Tadros 2016, pp. 96-100). If the potential for undeserved punishment is sufficiently limited, and the reasons for criminalisation sufficiently strong, then over-inclusive criminalisation might be justifiable.

These conditions can arguably be satisfied for the criminalisation of gun possession. First, law-makers can minimise the impact of such criminalisation on the truly innocent: they can offer them controlled and/or conditional access to some types of guns, for example, while reserving absolute prohibition for the most dangerous types. Second, law-makers have good reasons to define gun possession offences in an over-inclusive way: that is, to criminalise possession itself, and not just the various types of wrongful possession. These reasons include clarity and ease of application, but also preventive efficacy. As we saw above, the criminalisation of mere possession will arguably prevent significantly more harm than the criminalisation of wrongful possession alone. Increasing the security of the many in this way might justify decreasing the security of a few from conviction and punishment – especially when these latter harms are easy for citizens to avoid (Tadros 2016, pp. 332-333).

By contrast, some other offences of mere possession will not be justifiable in this way: in particular, those criminalising articles that are less dangerous than guns. Notable examples are the offences created in some jurisdictions that criminalise the possession of instructional materials for terrorists, such as training manuals. Law-makers will struggle to minimise the impact of such offences on the truly innocent, since material that assists terrorists will probably also assist ordinary people in some ways. Likewise, they have only weak reasons to define these offences in an over-inclusive way. In this context, criminalising mere possession is unlikely to prevent significantly more harm than criminalising possession with terrorist intent – partly

because criminalisation is unlikely actually to reduce the availability of the relevant materials. Additionally, the costs of these offences include lengthy prison sentences that treat the truly innocent like actual terrorist offenders. These costs are unlikely to be outweighed by the modest security benefits of these offences (Cornford 2015, pp. 23-27; McSherry 2008; Tadros 2008, pp. 965-969).

Overall, then, there is no decisive argument against even these most inchoate of inchoate crimes. We surely owe some duties to promote one another's security, which may justify the punishment of some criminal possession. And even potential undeserved punishments may be justified by the security benefits of having possession *offences* (although this raises the difficult further question of how severe such punishments can legitimately be). The charge that these offences are over-inclusive certainly demands a serious answer – but the prevention of harm can arguably provide that answer. The remaining question for law-makers is how far this justification can be stretched.

6. Over-Inclusion in Inchoate Crimes

Preventive efficacy is a tempting rationalisation for over-inclusive crimes. By defining offences in an over-inclusive way – for example, by criminalising all gun possession, rather than just wrongful gun possession – law-makers can prevent more of the ultimate harm with which they are concerned. This is partly because such offences might deter a wider range of potentially harmful conduct. But also, they afford wider enforcement powers, which can be used to disrupt or incapacitate dangerous actors. It is easier, for example, to arrest a potential killer on suspicion of possessing a gun than of possessing a gun with intent to kill. Yet as we have seen, there are also strong reasons against creating over-inclusive offences. To what extent can preventive efficacy justify offences that authorise the conviction and punishment of the undeserving? We can answer this question here only superficially, but it is worth doing so, since so many recently enacted offences are most charitably seen as over-inclusive inchoate crimes.

The best-known examples of this phenomenon are offences of *abstract* or *implicit* endangerment. These offences target unjustifiable risk-taking, but do so without

making such risk-taking a required element of the offence; instead, they criminalise a more specific type of conduct as a proxy for that risk. Textbook examples include offences that criminalise exceeding a speed or blood-alcohol limit, in order to target dangerous driving; and offences that criminalise sexual contact with persons below an age of consent, in order to target the risk of sexual exploitation. However, the phenomenon also extends to offences targeting other forms of inchoate wrongdoing. Consider crimes of membership in prohibited organisations. These offences criminalise the status of membership, in order to target both preparatory conduct in which members are involved and their assistance or encouragement of other members' criminal conduct (Levanon 2012). As with offences of implicit endangerment, the criminalisation of proxy conduct renders these offences over-inclusive, relative to the wrongs that they target.

The most familiar justifications for defining offences in such a way are *determinacy* and *guidance*. If law-makers wish to avoid over-inclusion, then as we have seen, they will often have to use indeterminate criteria in defining offences: for example, requiring that the targeted risk be unreasonable or unjustifiable. Such indeterminacy is bad in itself: it makes official decision-making inefficient and inconsistent, and thus makes the law less predictable for citizens. But paradoxically, it can also lead to ineffective guidance on when conduct is actually wrongful. We all have biases and other cognitive blindspots that lead us to misjudge what is reasonable or justified; to help avoid such misjudgements, law-makers thus have reason to avoid relying on such indeterminate concepts. For example, as guidance on risky driving, 'Don't drive drunk' or 'Don't exceed 30 miles per hour in residential areas' may be more effective than simply 'Don't drive dangerously'.

Whether over-inclusion of this kind is justified is a question of cost and balance of errors. Which is better: to risk inefficiency, unpredictability, and ineffective guidance, or to prohibit some conduct that, ideally, the law should not prohibit? This question is familiar in the life of the law generally (Alexander and Sherwin 2001; Schauer 1991). But once again, many argue that it requires a special answer in the criminal law context, where 'prohibiting' conduct means authorising its conviction and punishment. To convict and punish the undeserving is an infringement of their rights, and it is debatable whether such infringements can be justified by determinacy

alone. At best, the argument goes, such consequences should be grudgingly tolerated, to the extent that they are strictly necessary in achieving sufficient determinacy (Alexander and Ferzan 2009, pp. 288-316; Ashworth and Zedner 2014, pp. 115-116; Husak 1998; 2007, pp. 153-159; compare Duff 2007, pp. 166-172; Simester and von Hirsch 2011, pp. 75-79).

However, in the context of over-inclusion for reasons of prevention, this minimalist approach is too simple. Even if there is a single 'sufficient' level of determinacy for criminal offences, there is no such level of prevention: all else being equal, it is always better to prevent *more* harm. Moreover, as a reason for over-inclusion, the prevention of harm is much stronger than determinacy. To the extent that over-inclusion will actually prevent more harm, there are thus strong reasons in its favour. At the same time, of course, greater over-inclusion also generates stronger reasons *against* criminalisation. The more over-inclusive an offence, the more undeserved convictions and punishments it authorises – and the more people's rights will be infringed. Again, law-makers are left with a difficult judgement call: balancing some citizens' security from wrongful conviction and punishment against others' security from wrongful harm.

For example, consider speed limits in residential areas. A speed limit of 20 miles per hour would greatly reduce pedestrian deaths and injuries, but would also lead to many safe drivers being unjustly convicted and punished. A limit of 50 miles per hour, meanwhile, would avoid many such unjust convictions, but would also fail to prevent most injury-accidents. Or consider the age of consent. An age of 18 would catch many exploitative sexual encounters, but would also criminalise the normal sexual experiences of most of the population. An age of 12, meanwhile, would avoid this result, but would also fail to catch much exploitative conduct. In seeking the right compromise in either case, it is unhelpful – perhaps even meaningless – to ask what standard is necessary to achieve the offence's preventive aims.

To add further to this complexity, there are different types of over-inclusive offence – some of which are harder to justify than others. So far, we have mainly been considering offences that, despite their over-inclusiveness, are meant to lead to the deterrence and punishment *of the conduct that they criminalise*. For example, law-

makers criminalise gun possession in order to prevent gun-related deaths and injuries; but in doing so, they hope that citizens will actually avoid acquiring and owning guns, and that those who violate this prohibition will be prosecuted. Like all over-inclusive crimes, such offences are difficult to justify, but they at least treat citizens with a certain kind of respect. In particular, the guidance that they give is at least honest: they are clear as to both the conduct that citizens are expected to avoid, and the conduct that officials are expected to pursue, prosecute, and punish.

Some other over-inclusive offences, by contrast, treat citizens less respectfully and honestly. These offences are intended not to prevent and punish *all* the conduct that they criminalise, but rather only a sub-set of this conduct. They aim to expand the powers of enforcement officials in relation to this sub-set, by making it easier for them to arrest, investigate, prosecute, and eventually punish those whom law-makers *really* mean to target. For example, when English legislators criminalised consensual sexual contact between teenagers, they did not intend to deter teenagers from engaging in this conduct – or to facilitate their conviction and punishment if they did so. Rather, they intended to make it easier to prosecute *exploitative* forms of sexual contact, by removing requirements like proof of non-consent. The resulting offence therefore issues guidance that neither citizens nor officials are honestly expected to follow.

Over-inclusive crimes of this second type are especially difficult to justify. They carry the usual costs of over-inclusion, often to a greater degree: they remove further obstacles to unjust conviction, and thus further restrict citizens' liberties. But they also infringe other rights that citizens are often thought to have. Most obviously, they undermine an aspect of the rule of law: they deprive citizens of the ability to use the law as a guide to what they may and may not do, without becoming liable to conviction and punishment. They also undermine procedural justice: they deprive defendants of the ability to answer for the conduct that purportedly justifies their conviction, and they free prosecutors from having to prove that conduct in court (Edwards 2010; Tadros 2008, pp. 951-964). In relation to these offences, citizens' rights against unjust punishment are thus not the only rights at stake – and so we must be especially careful before concluding that they are justified by preventive efficacy alone.

Where does all of this leave, for example, offences of membership in prohibited organisations? On the one hand, these offences probably prevent significantly more harm than offences of preparation, assistance, and encouragement. They deter citizens from conduct that – partly because of the organisational context – can easily lead to such inchoate wrongdoing, and they empower officials to intervene at an earlier stage. Moreover, their costs to citizens' liberties – of removing the option to become a member of a criminal organisation – are relatively low. On the other hand, these offences facilitate unjust convictions and punishments: for example, of merely passive or nominal members, or of members who are involved only in an organisation's civic or political activities. They can also be used against those whom the state really suspects of preparing or assisting crimes, in order to circumvent their procedural rights. Arguably, indeed, it is this – and not the deterrence and punishment of mere membership – that is the true aim of these offences. Whether the efficient prevention of organised criminal activity can justify such infringements of citizens' rights – and if so, just how efficient that prevention needs to be – seems a difficult question indeed.

7. Conclusions

We began by noting that many people are sceptical about the expanding scope of inchoate criminality. We can now see that, while this scepticism is in some ways well-founded, we should view this expansion with mixed feelings. The scepticism is well-founded because criminalisation is indeed unique among the tools available to law-makers. Justifying criminalisation means justifying liability to punishment, conviction, and enforcement action by state officials – and that is no easy task. Our feelings should be mixed because this is not a decisive case, or even a persuasive *prima facie* case, against all inchoate crimes. The prevention of serious harm is a powerful justifying aim – and for at least some of the offences considered here, criminalisation seems an appropriate means of achieving that aim. Like any proposals for new criminal offences, proposals for new inchoate crimes must be carefully scrutinised. Scrutiny based on blanket scepticism, however, is not careful enough.

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